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Hudson v. McMillian: Cruel and Unusual Punishment Takes One Step Forward, Two Steps Back

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HUDSON V. MCMILLIAN: CRUEL AND UNUSUAL PUNISHMENT TAKES ONE STEP FORWARD, TWO STEPS BACK

I. INTRODUCTION

From 1960 to 1989, the prison population in federal and state institutions grew from almost 213,000 to over 675,000 inmates.[1] Along with the growth in numbers, this time period saw significant changes in Eighth Amendment jurisprudence which affected the ability of these prisoners to file claims alleging Eighth Amendment violations.[2] Historically, the Supreme Court took the view that the Eighth Amendment applied only in the context of reviewing the sentencing of prisoners, not the treatment they received after incarceration.[3] Beginning in 1976 with *Estelle v. Gamble*,[4] the Court applied the Eighth Amendment to claims arising from treatment received by incarcerated prisoners.[5] Since *Estelle*, prisoners have directed Eighth Amendment claims at three specific areas—medical needs, prison conditions and excessive physical force. Prior to *Estelle*, no express intent to inflict pain was required for the Eighth Amendment to be violated.[6] More recently, the Court developed a two prong test in determining whether a prisoner's Eighth Amendment rights have been violated which requires both an objective and subjective analysis. The objective analysis asks whether officials inflicted sufficient harm, and the subjective analysis asks whether officials acted with a sufficiently culpable mind.[7]

In 1990, the Fifth Circuit Court of Appeals determined that serious injury was necessary to satisfy the objective component in any claim by a prisoner alleging excessive force.[8] In *Hudson v. McMillian*,[9] the Supreme Court addressed the issue of whether the use of excessive physical force against a prisoner constitutes cruel and unusual punishment under the Eighth Amendment when the prisoner does not suffer serious physical injury.[10] *Hudson* defines the standard for all Eighth Amendment claims of excessive physical force.[11] The Court held that serious injury is not required to satisfy the objective component of the

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 193 (111th ed. 1991).

2. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *See* Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting).

4. 429 U.S. 97 (1976).

5. *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

6. *See* Whitley v. Albers, 475 U.S. 312, 319, 328-29 (1986).

7. *See Wilson*, 111 S. Ct. at 2324.

8. Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990).

9. 112 S. Ct. 995 (1992).

10. *Id.* at 997.

11. *Id.*

Eighth Amendment analysis.[12] The Court further held the subjective component requires a determination that prison officials acted maliciously and sadistically rather than in a good faith effort to control the prisoner.[13] This Comment examines the precedent created by *Hudson* and its likely future impact against the background of Eighth Amendment analysis and the evolution of the subjective element. In conclusion, this comment specifically and critically analyzes the heightened subjective standard established by the Court.

II. BACKGROUND

The drafters of the Eighth Amendment penned its words with the intent to outlaw torture and other cruel punishments.[14] In *Trop v. Dulles*,[15] the Court stated that the basic concept underlying the Eighth Amendment is the dignity of man.[16] The Court in *Trop* said that the words of the amendment are imprecise and their scope not static; that instead the words must draw their meaning "from the evolving standards of decency that mark the progress of a maturing society."[17] In *Gregg v. Georgia*,[18] the Court further directed that measuring punishments against the standard of public decency is not the end of an inquiry into Eighth Amendment claims; the punishment also cannot be excessive.[19] The *Gregg* Court defined excessive punishment as that which involves the unnecessary and wanton infliction of pain or punishment grossly disproportionate to the severity of the crime.[20]

In *Estelle v. Gamble*[21] the Court first addressed the question of

12. *Id.* at 999.

13. *Id.*

14. Estelle v. Gamble, 429 U.S. 97, 102 (1976). For further background on the Eighth Amendment, see Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 316-22 (1972); Trop v. Dulles, 356 U.S. 86, 99-103 (1958); Weems v. United States, 217 U.S. 349, 368-80 (1910); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (detailed analysis of the development of the Eighth Amendment); Ira P. Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency On Guessing, Stressing, and Redressing Constitutional Rights*, 26 KAN. L. REV. 551, 552-55 (1978) (historical perspective of the Eighth Amendment); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972) (examining treatment of the amendment by the United States Supreme Court and the rationale for limiting punishments); Note, *Constitutional Law—The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966) (historical perspective of cruel methods of punishment and cruelly excessive punishments); Andre Sansoucy, Note, *Applying The Eighth Amendment To The Use Of Force Against Prison Inmates*, 60 B.U. L. REV. 332, 332-35 (1980) (development of Eighth Amendment jurisprudence); Recent Case, *Constitutional Law—Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134, 135-37 (1949) (development of the amendment in American history); Recent Development, *Constitutional Law—Cruel and Unusual Punishments—Eighth Amendment Prohibits Excessively Long Sentences*, 44 FORDHAM L. REV. 637, 638 (1975) (historical perspective of the Eighth Amendment).

15. 356 U.S. 86 (1958).

16. *Id.* at 100 (plurality opinion).

17. *Id.* at 100-01.

18. 428 U.S. 153 (1976).

19. *Id.* at 173.

20. *Id.*

21. 429 U.S. 97 (1976).

whether the Eighth Amendment applied to prisoners' claims when the punishment was not part of the sentence.[22] The prisoner in *Estelle* brought a § 1983[23] action claiming that prison officials violated his Eighth Amendment rights by refusing him proper medical care.[24] The *Estelle* Court stated that punishments "incompatible with the evolving standards of decency that mark the progress of a maturing society" and punishments involving "the unnecessary and wanton infliction of pain" are repugnant to the Eighth Amendment.[25] In *Estelle*, the Court not only questioned whether prison officials inflicted pain (the objective test), it also questioned the mind set of the persons inflicting the pain, thus introducing a subjective test.[26] *Estelle* stands for the proposition that the deliberate indifference to the serious medical needs of prisoners is incompatible with the standards of decency in society and constitutes the unnecessary and wanton infliction of pain, thus violating the Eighth Amendment.[27] Further, the Court in *Estelle* held that the negligent in-

22. *See* Hudson v. McMillian, 112 S. Ct. 995, 1006 (1992) (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

23. 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Robinson v. California, 370 U.S. 660 (1962), made the Eighth Amendment applicable to the States through the Fourteenth Amendment. *Estelle*, 429 U.S. at 101-02. Cooper v. Pate, 378 U.S. 546 (1964), was the first time the Court recognized that a cause of action under 42 U.S.C. § 1983 could be brought against prison officials. The district court had dismissed the suit and Cooper appealed in forma pauperis. The Supreme Court reversed and recognized the cause of action as valid. *Cooper* was not an Eighth Amendment action, which is why *Estelle* is still the first case to address § 1983 actions in the Eighth Amendment context. A detailed discussion of the relationship between § 1983 actions and the Eighth Amendment is beyond the scope of this comment. For more information, see MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES §§ 3.8-3.9 (2nd ed., vol. 1, Supp. 1992); Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1989 - 1990*, 80 GEO. L.J. 939, 1710 (1992); Note, *A Review of Prisoners' Rights Litigation Under 42 U.S.C. § 1983*, 11 U. RICH. L. REV. 803, 858-80 (1977).

24. *Estelle*, 429 U.S. at 98. The prisoner in *Estelle* claimed that he injured his back while working in the prison and received improper medical treatment. *Id.*

25. *Estelle*, 429 U.S. at 102-03 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958); Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

26. *Estelle*, 429 U.S. at 104.

27. *Id.* at 104. The Court ruled that the prisoner's complaint failed to state a claim against the treating physician and medical director. The Court remanded for a determination of whether other prison officials displayed deliberate indifference to Gamble's medical needs. *Id.* at 108. For more information on prison medical conditions, see Phil Gunby, *Health Care Reforms Still Needed in the Nation's Prisons*, 245 JAMA 211 (1981); Wendy Lynn Adams, Comment, *Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?*, 27 AM. U. L. REV. 92 (1977) (addressing the federal courts interpretation of the Eighth Amendment and the standard applied to prisoner's claims of inadequate medical treatment); Michael Cameron Friedman, Note, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921 (1992) (examination of the standard applied to prisoner's claims under the Eighth Amendment); Robert Dvorchak, *Medicine Behind Bars: Quality Care Is Elusive, Despite Lawsuits; Hostile Public, Shortage of Good Doctors and Nurses Worsen Problem*, L.A. TIMES, June 18, 1989, at 2 (discussion of problems in providing adequate medical care in prisons); Elizabeth Levitan

fliction of unnecessary and wanton pain provided no cause of action unless the prisoner can prove that officials acted with deliberate indifference.[28] The subjective standard, that deliberate indifference constitutes the "unnecessary and wanton infliction of pain," was applied specifically in the context of medical needs.[29]

In *Hutto v. Finney*[30] the Court addressed the question of whether prison deprivation claims under § 1983 were valid as Eighth Amendment actions and declared confinement in prison a form of punishment subject to scrutiny under the amendment.[31] In *Hutto*, the prison conditions were so severe, the district court declared them cruel and unusual and characterized that particular prison as "a dark and evil world completely alien to the free world."[32] Because neither party disputed the district court's finding that the conditions constituted cruel and unusual punishment, the Court did not address whether the subjective test applied in the context of deprivation in prison.[33]

In *Rhodes v. Chapman*,[34] the Court held that placing pairs of prisoners in cells measuring sixty-three square feet was not cruel and unusual punishment.[35] The Court's analysis focused on the objective test of whether the deprivations were sufficiently serious to constitute the un-

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Spaid, *Advocates Urge Better Conditions for Women Inmates*, CHRISTIAN SCIENCE MONITOR, May 29, 1991, at 9.

28. *Estelle*, 429 U.S. at 105-06.

29. *Id.* at 104. *See also Hudson*, 112 S. Ct. at 1000. The introduction of the subjective element probably resulted because *Estelle* addressed for the first time whether the Eighth Amendment applied in the context of the treatment of a prisoner after sentencing. *Hudson*, 112 S. Ct. at 1006 (Thomas, J., dissenting); Wilson v. Seiter, 111 S. Ct. 2321, 2323 (1991).

30. 437 U.S. 678 (1978).

31. *Id.* at 685. For further discussion of prison condition claims, see James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights Of Protective Custody Inmates*, 56 U. CIN. L. REV. 91 (1987); Deborah A. Montick, Comment, *Challenging Cruel and Unusual Conditions of Prison Confinement: Refining the Totality of Conditions Approach*, 26 HOW. L.J. 227 (1983).

32. *Hutto*, 437 U.S. at 681. The prison housed convicts in hundred-man barracks. Armed convicts known as "creepers" crawled along the floor at night stalking their victims. Seventeen stabbings occurred in one 18-month period. Homosexual rape was so common that some prisoners spent the night clinging to the bars nearest one of the guard stations. Officials allowed prisoners in isolation only 1000 calories of food per day, although the National Academy of Sciences recommended daily allowance was 2700. Isolated prisoners' meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs and seasoning into a paste and baking the mixture in a pan. Most of the guards were simply inmates who had been issued guns. It was "within the power of a trusty guard to murder another inmate with practical impunity," because trusties with weapons were authorized to use deadly force against escapees. One trustee fired his shotgun into a crowded barracks because the inmates would not turn off their TV. The main issues addressed by the Supreme Court were whether prisoners could be kept in isolation for more than 30 days and whether the State of Arkansas was responsible for the attorney's fees of the petitioners. *Id.* at 681-89. For more information on the duty to protect inmates from violence, see James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101 (1985-1986); Catherine A. Greene, Comment, *Rape: The Unstated Sentence*, 15 PAC. L.J. 899 (1984).

33. *Hutto*, 437 U.S. at 685.

34. 452 U.S. 337 (1981).

35. *Id.* at 352.

necessary and wanton infliction of pain.[36] Although the conditions in *Rhodes* inflicted pain on the prisoners, the pain was not sufficient for an Eighth Amendment violation.[37] The Court declared that absent serious deprivation, restrictive and harsh conditions are often part of the penalty that criminal offenders pay for their offenses against society.[38] In both *Hutto* and *Rhodes*, the decisions were based on the "objective" analysis of whether the deprivations were serious enough to constitute cruel and unusual punishment,[39] and no consideration was given to whether the officials acted with a culpable state of mind.[40]

The subjective element of the *Estelle* decision was not lost, however, because the Court specifically addressed the subjective element in its next major Eighth Amendment case: *Whitley v. Albers*.[41] In *Whitley*, prisoners rioted and took a guard hostage.[42] While trying to free the guard, prison officials shot the plaintiff in the leg as he attempted to get back to his cell.[43] *Whitley* addressed the issue of what standard governs a prisoner's § 1983 claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of quelling a prison riot.[44] The *Whitley* Court reaffirmed that the unnecessary and wanton infliction of pain upon prisoners is a violation of the Eighth Amendment.[45] However, the Court went on to say that what is unnecessary and wanton must vary according to the context in which the Eighth Amendment violation is charged.[46] The context in *Whitley* was the use of physical force during an effort to quash a prison riot.[47] In *Estelle*, the context was the refusal of medical care.[48] Because of the contextual differences, the *Whitley* Court refused to apply the subjective standard of deliberate indifference established by the *Estelle* Court in determining

36. *Id.* at 347.

37. *Id.* at 348-49. For further discussion of prison overcrowding, see Debra Borenstein, *Double-Celling at Pontiac: Are Inmates Being Subjected to Cruel and Unusual Punishment Arising Out of Overcrowded Conditions?*, 60 CHI.-KENT L. REV. 291 (1984); Robert G. Leger, *Perception of Crowding, Racial Antagonism and Aggression in a Custodial Prison*, 16 J. CRIM. JUST. 167 (1988).

38. *Hutto*, 452 U.S. at 347.

39. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

40. *Id.*

41. 475 U.S. 312 (1986). For a more detailed analysis of *Whitley*, see Elizabeth A. Blackburn, Note, *Prisoners' Rights: Will They Remain Protected After Whitley?*, 16 STETSON L. REV. 385 (1986); Melissa Whish Coan, Comment, Whitely [sic] v. Albers: *The Supreme Court's Attempted Synthesis of Eighth Amendment Standards for Prison Officials*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 155 (1988); Robert A. West, Comment, *Constitutional Law: Quelling a Prison Riot: Cruel and Unusual Punishment or a Necessary Infliction of Pain?*, 26 WASHBURN L.J. 208 (1986).

42. *Whitley*, 475 U.S. at 314-15.

43. *Id.* at 316.

44. *Whitley*, 475 U.S. at 314. *See* Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173 (1987).

45. *Whitley*, 475 U.S. at 319.

46. *Id.* at 320.

47. *Id.*

48. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

whether the infliction of pain was unnecessary and wanton.[49]

In its attempt to establish a standard to apply in the context of a prison riot, the *Whitley* Court looked to a Second Circuit Court of Appeals decision: *Johnson v. Glick*.[50] In *Johnson*, a prison guard at the Manhattan House of Detention for Men beat a prisoner being held on a felony charge.[51] The court of appeals addressed Johnson's excessive force claim under the due process clause of the Fourteenth Amendment rather than as an Eighth Amendment action.[52] The Second Circuit emphasized that constitutional protection is not as extensive as common law battery claims and that not every push or shove by a guard constitutes excessive force, even if it later seems unnecessary.[53] *Johnson* established a test for determining whether excessive force had been used that involved four factors: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; (3) the extent of the injury inflicted; and (4) whether the force applied was in a good faith effort to maintain or restore discipline or done maliciously and sadistically for the very purpose of causing harm.[54]

The Supreme Court in *Whitley* adopted the fourth element of the Second Circuit's *Johnson* test[55] and held that determining whether officials inflicted unnecessary and wanton pain in the context of controlling a prison riot turns on whether they applied force in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[56] Because it found that the prison officials shot Whitley in a good faith effort to quell the prison riot, the Court held that the shooting did not meet the standard of malicious and sadistic behavior and therefore did not violate the Eighth Amendment under the new test.[57]

In establishing the higher subjective threshold, the Court recognized the pressures facing prison officials in an emergency situation.[58] The new subjective threshold in the context of a prison riot allowed the Court to ensure that prison officials would have wide-ranging boundaries in which to carry out their responsibilities.[59] The practical effect of

49. *Whitley*, 475 U.S. at 320.

50. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). For further discussion of *Johnson*, see Andre Sansoucy, Note, *Applying the Eighth Amendment to the Use of Force Against Prison Inmates*, 60 B.U. L. REV. 332, 335-36 (1980).

51. *Johnson*, 481 F.2d at 1029.

52. *Id.* at 1031-32. There appear to be two reasons the *Johnson* court did not address the Eighth Amendment issue: 1) the court felt that the Eighth Amendment only applied to the deliberate infliction of punishment by judicial sentences or legislative acts, and 2) the beating of the prisoner took place before conviction and sentencing, and the court felt that the Eighth Amendment only applied to claims arising after sentencing and conviction. The court in *Johnson* found that the claim was valid because the prisoner had been denied due process as guaranteed by the Fourteenth Amendment. *Id.*

53. *Id.* at 1033.

54. *Id.*

55. *Whitley*, 475 U.S. at 320-21.

56. *Id.*

57. *Id.* at 326.

58. *Id.* at 320.

59. *Id.* at 321-22. Justice Marshall dissented and filed an opinion in which Justices

Whitley was to establish a subjective standard of "malicious and sadistic" infliction of pain as the test for claims of Eighth Amendment violations in the context of a prison riot. When adopting the fourth element of the *Johnson* test (that is, whether officials applied the force in a good faith effort to maintain or restore discipline), the *Whitley* Court suggested that the first three elements of the test *related* to the ultimate determination of the whether the force was malicious and sadistic.[60] However, the vast majority of lower federal courts began to use all four elements of the *Johnson* test to determine all excessive force claims, including Eighth Amendment claims.[61]

The next major case to address the Eighth Amendment rights of prisoners was *Wilson v. Seiter*.[62] *Wilson* was another case brought under section 1983 charging prison officials with cruel and unusual punishment because of deprivations in prison.[63] The prisoners in *Wilson* brought general complaints of overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate rest rooms and unsanitary dining facilities and food preparation.[64] The *Wilson* Court followed the precedents of *Hutto* and *Rhodes* and described the objective test as a determination of whether the deprivation was sufficiently serious to constitute the infliction of unnecessary and wanton pain.[65] However, *Wilson* went beyond the precedents of *Hutto* and *Rhodes*, firmly establishing the subjective test as a necessary part of an Eighth Amendment analysis when applied to prisoners' claims about the treatment they receive after incarceration.[66] In establishing the importance of the subjective test, the *Wilson* Court broadened *Estelle* and *Whitley* by holding that whether a case was one of conditions of confinement, supplying medical needs or of restoring official control over a prison riot, courts should inquire into the prison official's state of mind when it is claimed that the official inflicted cruel and unusual punishment.[67] The Court went on to state that if the inflicted pain is not formally administered as punishment ordered by a statute or sentencing judge, some mental element must be attributed to the inflicting officer before the punishment can qualify as cruel

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Brennan, Blackmun and Stevens joined because they felt the malicious and sadistic standard would make it too difficult for prisoners injured in riots to successfully bring Eighth Amendment actions. *Id.* at 328.

60. *Id.* at 321. *See also* Graham v. Connor, 490 U.S. 386, 398 n.11 (1989).

61. *See Graham*, 490 U.S. at 393.

62. 111 S. Ct. 2321 (1991). For a more detailed discussion of *Wilson*, see Arthur B. Berger, Note, Wilson v. Seiter: *An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565; Russell W. Gray, Note, Wilson v. Seiter: *Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992); Amanda Rubin, Note, *Before And After* Wilson v. Seiter: *Cases Challenging the Conditions of Confinement in the Ninth Circuit*, 22 GOLDEN GATE U. L. REV. 207 (1992).

63. *Wilson*, 111 S. Ct. at 2322.

64. *Id.*

65. *Id.* at 2324.

66. *Id.*

67. *Id.*

and unusual.[68] *Wilson* affirmed the context-specific approach to questions of whether officials inflicted unnecessary and wanton pain[69] and adopted the deliberate indifference standard from *Estelle* as the subjective standard in the context of prison confinement claims.[70] *Wilson* also left intact the objective test articulated in *Hutto* and *Rhodes*.[71]

In *Huguet v. Barnett*,[72] the Fifth Circuit Court of Appeals combined the objective and subjective elements of an Eighth Amendment analysis into a four part test. Under this analysis a prisoner was required to prove four elements to prevail in an Eighth Amendment claim: (1) a significant injury[73] which; (2) resulted directly and solely from the use of force which was clearly excessive; (3) objectively unreasonable; and (4) an unnecessary and wanton infliction of pain.[74] Proof of all four elements was mandatory for a successful claim.[75] The court said that the first three elements of the test embodied the objective part of an Eighth Amendment analysis and the fourth element embodied the subjective test.[76] This evolution of the objective and subjective tests of the Eighth Amendment provides the setting for *Hudson v. McMillian*.[77]

III. *HUDSON V. MCMILLIAN*

In *Hudson*, the United States Supreme Court held that serious injury is not required in order to satisfy the Eighth Amendment's objective test.[78] The Court further established that the subjective test in all Eighth Amendment excessive force claims requires a determination of whether the prison official acted in good faith or maliciously and sadistically in inflicting the harm.[79]

A. *Facts and Procedural History*

The petitioner, Keith Hudson, was an inmate at the state penitentiary in Angola, Louisiana.[80] The respondents, Jack McMillian, Marvin

68. *Id.* at 2325.
69. *Id.* at 2326.
70. *Id.* at 2327.
71. *Id.* at 2324. *See also* Hudson v. McMillian, 112 S. Ct. 995, 1001 (1992).
72. 900 F.2d 838, 841 (5th Cir. 1990).
73. The serious injury requirement of the *Huguet* court's test may follow from looking at the objective elements of *Wilson* and *Estelle*, which required serious deprivations and serious medical needs respectively. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991); Estelle v. Gamble, 429 U.S. 97, 104 (1976). The *Johnson* court's language in stating that not every common law battery rises to the level of a constitutional violation may have been another factor in requiring serious injury. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). For a discussion of constitutional torts, see Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987).
74. *Huguet*, 900 F.2d at 841.
75. *Id.*
76. *Id.*
77. 112 S. Ct. 995 (1992). *See also* Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3.
78. *Hudson*, 112 S. Ct. at 997.
79. *Id.* at 999.
80. *Id.* at 997.

Woods and Arthur Mezo, served as corrections security officers at the Angola facility.[81] On October 30, 1983, Hudson and McMillian argued, so McMillian and Woods placed Hudson in handcuffs and shackles, took him out of his cell, and walked him toward the penitentiary's "administrative lockdown" area.[82] On the way there, McMillian punched Hudson in the mouth, eyes, chest and stomach while Woods held Hudson in place and kicked and punched him from behind.[83] Mezo, the supervisor on duty, watched the beating but merely told the officers "not to have too much fun."[84] As a result of the beating, Hudson suffered minor bruises and swelling of his face, mouth and lip.[85] The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.[86]

Hudson brought a claim under section 1983[87] alleging that the beating administered by prison guards violated the Eighth Amendment's prohibition of cruel and unusual punishment.[88] The parties consented to the case being tried before a magistrate,[89] who found: (1) that Hudson's injuries were minor; (2) that McMillian and Woods used force when there was no need to do so; and (3) that Mezo expressly condoned their actions.[90] The magistrate awarded Hudson damages of $800.[91] The Fifth Circuit Court of Appeals reversed.[92] The circuit court applied the test it laid down in *Huguet*[93] and held that inmates alleging the use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury, (2) resulting directly and only from the use of force clearly excessive to the need, (3) the excessiveness of which was objectively unreasonable, and (4) that the action constituted an unnecessary and wanton infliction of pain.[94] The court's test required that all elements be met before there could be an Eighth Amendment violation,[95] and the court determined that the force used by McMillian and Woods met all of the elements except for the significant injury element.[96] The United States Supreme Court granted certiorari to determine if the use of excessive physical force against a prisoner constitutes cruel and unusual punishment when the inmate does not suffer serious injury.[97]

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81. *Id.*

82. *Id.* Neither the Fifth Circuit Court of Appeals nor the Supreme Court gave a definition of the "administrative lockdown" area or its purpose.

83. *Hudson*, 112 S. Ct. at 997.

84. *Id.*

85. *Id.*

86. *Id.*

87. Civil Rights Act, 42 U.S.C. § 1983 (1988). *See supra* note 23 for full text of the statute.

88. *Hudson*, 112 S. Ct. at 997-98.

89. *See* 28 U.S.C. § 636(c) (1988).

90. *Hudson*, 112 S. Ct. at 998.

91. *Id.*

92. Hudson v. McMillian, 929 F.2d 1014 (5th Cir. 1990), *rev'd*, 112 S. Ct. 995 (1992).

93. Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990). For background, see *supra* notes 72-77 and accompanying text.

94. *Hudson*, 929 F.2d at 1015 (citing *Huguet*, 900 F.2d at 841).

95. *Id.*

96. *Hudson*, 929 F.2d at 1015.

97. *Hudson*, 112 S. Ct. at 997, 1004.

B. *Holding*

1. Majority Opinion

Justice O'Connor's majority opinion revisited *Whitley* and affirmed the underlying principle that the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.[98] Justice O'Connor noted, however, that the standard for "unnecessary and wanton infliction of pain" varies according to the context of the alleged constitutional violation,[99] pointing to *Estelle* and citing the deliberate indifference standard in medical needs cases as an example of the variance.[100] The deliberate indifference standard in *Estelle* was termed appropriate because the majority felt that the State's responsibility to provide inmates with medical care did not ordinarily conflict with competing administrative concerns.[101]

In reviewing *Whitley*, the Court stated that in the context of a prison riot, different concerns arise than in the medical needs context.[102] In the riot context, prison officials are concerned with the threat unrest poses to the inmates, prison workers, administrators and visitors.[103] Prison officials must balance these concerns against the harm that inmates may suffer if guards use force and then make a decision in haste, under pressure and often without the opportunity of a second chance.[104] Because of the different concerns in *Whitley's* prison riot context, the deliberate indifference standard was rejected and replaced by a malicious and sadistic standard.[105]

In a major expansion of the *Whitley* doctrine, the Court concluded that the same underlying concerns arise any time a guard must use force to maintain order, whether in a riot situation or not.[106] Whether the prison disturbance is a riot or lesser disturbance (such as the one that involved Hudson) prison officials must still balance the need to maintain order through force against the risk of injury to inmates.[107] Both situations, a riot or lesser disturbance, require officials to act quickly and decisively, therefore, both situations trigger the principle that prison administrators should be given wide-ranging deference in carrying out the responsibility of maintaining order in the prison.[108] Because of the

98. *Id.* at 998 (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)).
99. *Id.* (citing *Whitley*, 475 U.S. at 320).
100. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).
101. *Id.* (citing *Whitley*, 475 U.S. at 320).
102. *Id.*
103. *Id.*
104. *Id.* (citing *Whitley*, 475 U.S. at 320).
105. *Id.* (citing *Whitley*, 475 U.S. at 320-21).
106. *Id.* at 998.
107. *Id.* at 998-99.
108. *Id.* at 999 (citing *Whitley*, 475 U.S. at 321-22). *See also* Rhodes v. Chapman, 452 U.S. 337, 349 n.14 (1981) ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators"); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). For further discussion of judicial deference, see Emily Calhoun, *The Supreme Court and The Constitutional Rights*

similarities between riots and lesser disturbances, the Court held that the new standard by which to judge all claims of excessive force is the test set forth in *Whitley*: whether the force is applied in a good-faith effort to maintain or restore discipline, or applied maliciously and sadistically to cause harm.[109] Citing appellate decisions from the Second, Fourth, Sixth, Eighth, and Eleventh Circuits, the Court reasoned that extending the *Whitley* standard to all claims of excessive force established nothing new for most circuits.[110] After establishing the new standard for an excessive force claim, the Court determined the role that the extent of injury plays in the standard.

Under the *Whitley* test, the extent of injury was simply one factor that suggests whether prison officials thought force was necessary or whether the force evidenced an unnecessary and malicious infliction of pain.[111] The *Hudson* Court suggested several other factors appropriate in evaluating whether the force was unnecessary and malicious: (1) the need for application of the force; (2) the relationship between the need and the amount of force used; (3) the threat reasonably perceived by the responsible officials; and (4) any efforts made to temper the severity of a forceful response.[112] Based on these relevant factors, the Court concluded that the absence of a serious injury is relevant to the Eighth Amendment inquiry, but does not end the analysis.[113] Addressing the respondent's claim that the objective analysis requires a serious injury, the Court said that the objective element of an Eighth Amendment claim requires asking if the alleged wrongdoing was "harmful enough" to establish a constitutional violation.[114] The subjective analysis determines whether the officials acted with a "sufficiently culpable state of mind."[115]

In addressing the objective standard, the Court said that what is necessary to show harm for purposes of the Eighth Amendment depends on the claim at issue for two reasons.[116] First, the Eighth Amendment should be applied with due regard for differences in the kind of

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of Prisoners: A Reappraisal, 4 HASTINGS CONST. L.Q. 219 (1977); Peter Keenan, *Constitutional Law: The Supreme Court's Recent Battle Against Judicial Oversight of Prison Affairs*, 1989 ANN. SURV. AM. L. 507 (1990); Irene Lambrou, Comment, *AIDS Behind Bars: Prison Responses and Judicial Deference*, 62 TEMP. L. REV. 327 (1989).

109. *Hudson*, 112 S. Ct. at 999.

110. *Id. See* Stenzel v. Ellis, 916 F.2d 423, 427 (8th Cir. 1990); Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990); Haynes v. Marshall, 887 F.2d 700, 703 (6th Cir. 1989); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988); Brown v. Smith, 813 F.2d 1187, 1188 (11th Cir. 1987). *But see* Unwin v. Campbell, 863 F.2d 124, 130 (1st Cir. 1988) (rejecting application of *Whitley* standard absent "an actual disturbance"); Wyatt v. Delaney, 818 F.2d 21, 23 (8th Cir. 1987) (absent matters involving institutional security a deliberate indifference standard should be used).

111. *Hudson*, 112 S. Ct. at 999 (citing *Whitley*, 475 U.S. at 321).

112. *Id.* The Court did not clearly state the role these elements play in determining whether force was malicious and sadistic. One commentator suggests that these elements are the proper basis for making that determination. Martin A. Schwartz, *The Prisoner Beating Case*, N.Y. L.J., Apr. 21, 1992, at 3.

113. *Hudson*, 112 S. Ct. at 999.

114. *Id.* (citing Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991)).

115. *Id.* (citing *Wilson*, 111 S. Ct. at 2329).

116. *Hudson*, 112 S. Ct. at 1000.

conduct against which the objection is lodged (i.e., physical force, prison deprivation or medical needs).[117] Second, the prohibition of cruel and unusual punishment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.[118] These two concerns result in an objective element of an Eighth Amendment claim that is contextual and responsive to contemporary standards of decency.[119] By way of illustration, the Court first reviewed claims directed at conditions of confinement.[120] Noting that routine discomfort is part of the penalty that offenders pay for their offenses, only deprivations which deny the minimal civilized measure of life's necessities do not fit with contemporary standards of decency.[121] Second, the Court made a similar analysis of medical needs claims.[122] It reasoned that society does not expect prisoners to have unqualified access to health care, therefore only deliberate indifference to medical needs does not fit with contemporary standards of decency.[123]

In an excessive force context, society's expectations are different.[124] Whenever prison officials maliciously and sadistically use force to cause harm, they violate contemporary standards of decency.[125] If only *serious* injury violated contemporary standards of decency, the Eighth Amendment would permit any physical punishment, no matter how cruel and inhumane, as long as it resulted in minor injuries.[126] The Court emphasized that doing away with the serious injury requirement did not make every touch or shove by a prison guard an actionable Eighth Amendment claim.[127] The Eighth Amendment excludes from constitutional recognition the de minimis use of force, provided that the force is not repugnant to the conscience of mankind.[128] Since Hudson's injuries were found to be more than de minimis, there was no basis for the dismissal of his claim.[129]

The majority then addressed the dissent's argument that by not requiring serious injury, the holding in *Wilson* was misapplied.[130] The majority distinguished *Wilson* in two ways: (1) it was not an excessive force claim, and (2) it did not address the objective analysis of the Eighth

117. *Id.* (citing *Whitley*, 475 U.S. at 320).
118. *Hudson*, 112 S. Ct. at 1000 (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
119. *Id.* at 1000.
120. *Id.*
121. *Id.* (citing *Rhodes*, 452 U.S. at 347).
122. *Id.* at 1000 (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (only deliberate indifference to medical needs did not fit with contemporary standards of decency)).
123. *Id. See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).
124. *Hudson*, 112 S. Ct. at 999.
125. *Id. See* Whitley v. Albers, 475 U.S. 312, 327 (1986).
126. *Hudson*, 112 S. Ct. at 999. *See Estelle*, 429 U.S. at 102. In *Hudson*, Justice O'Connor stated that allowing physical punishments that only resulted in minor injuries "would have been as unacceptable to the drafters of the Eighth Amendment as it is today." *Hudson*, 112 S. Ct. at 1000 (citing *Estelle*, 429 U.S. at 102).
127. *Hudson*, 112 S. Ct. at 999 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
128. *Id.* (citing *Whitley*, 475 U.S. at 327).
129. *Id.* at 1001.
130. *Id.* at 1001. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991).

Amendment inquiry.[131] Next, the difference in analyzing conditions of confinement claims and excessive force claims was reemphasized.[132] Justice O'Connor asked:

> How could it be otherwise when the constitutional touchstone is whether punishment is cruel and unusual? To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the " 'concepts of dignity, civilized standards, humanity, and decency' " that animate the Eighth Amendment.[133]

The opinion concluded with a refusal to address the respondent's claim that an isolated and unauthorized act of violence was not "punishment" under the Eighth Amendment.[134] This refusal was based on the court of appeals having left intact the Magistrate's decision that the beating was not an isolated assault, as there was testimony that McMillian and Woods had beat another inmate shortly thereafter.[135] The Court reversed the court of appeals and reinstated the judgment of the Magistrate.[136]

2. Concurring Opinions

Justice Stevens filed an opinion concurring in part and concurring in the judgment.[137] He argued that the justification for the higher standard of malicious and sadistic in *Whitley* is that emergency situations, such as prison riots, necessitate quick decisions and reactions.[138] Absent an emergency situation, however, Justice Stevens felt that the less demanding standard of unnecessary and wanton should be applied.[139] The rationale was that the unnecessary and wanton standard was more consistent with the principle that courts give due regard to the differences in the kind of conduct against which an Eighth Amendment violation is charged.[140]

Justice Blackmun filed an opinion concurring in the judgment.[141] He disagreed with the majority's extension of the malicious and sadistic

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131. *Hudson*, 112 S. Ct. at 1001.
132. *Id.*
133. *Id.* (quoting *Estelle*, 429 U.S. at 102).
134. *Hudson*, 112 S. Ct. at 1001. The Court did recognize that other courts have addressed the issue. *See* George v. Evans, 633 F.2d 413, 416 (5th Cir. 1980) ("a single, unauthorized assault by a guard does not constitute cruel and unusual punishment"); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.) *cert. denied*, 414 U.S. 1033 (1973) ("although a spontaneous attack by a guard is 'cruel' and, we hope 'unusual,' it does not fit any ordinary concept of 'punishment' "). *But see* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) *cert. denied*, 479 U.S. 816 (1986) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . . .").
135. *Hudson*, 112 S. Ct. at 1001-02.
136. *Id.* at 1002.
137. *Id.*
138. *Id.*
139. *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Justice Stevens also dissented in *Whitley* to the establishment of the malicious and sadistic standard. Whitley v. Albers, 475 U.S. 312, 328 (1986) (Stevens, J., dissenting).
140. *Hudson*, 112 S. Ct. at 1002.
141. *Id.*

standard to all allegations of excessive force.[142] Justice Blackmun addressed the respondents' claim that not requiring excessive injury would cause the courts to be overburdened with prisoners' suits.[143] He reasoned that the floodgates would not be opened for several reasons: (1) prisoners are required to exhaust administrative remedies under section 1983; (2) officials may raise a qualified immunity defense and (3) district courts may dismiss any complaint found to be frivolous or malicious.[144] He stated that the burden on the courts is worth bearing when a prisoner's suit has merit and that the right to file for legal redress in the courts is probably more valuable to a prisoner than to any other citizen.[145] Justice Blackmun expressed his opinion that the Eighth Amendment prohibits "pain," not "injury," and that pain, in its ordinary meaning, surely includes a notion of psychological harm.[146] The Justice concluded by stating that psychological pain that is above de minimis would surely be actionable in an Eighth Amendment setting.[147]

3. Dissenting Opinion

Justice Thomas filed a dissenting opinion, his first writing for the court, in which Justice Scalia joined.[148] Justice Thomas disagreed with the majority's decision that a prisoner is not required to prove serious injury to have an actionable claim under the Eighth Amendment.[149] He stated that allowing any tortious conduct to rise to the level of a constitutional claim goes far beyond the precedents of the Court.[150]

Justice Thomas would have affirmed the Fifth Circuit's judgment. Emphasizing that the magistrate who found the facts in the case considered Hudson's injuries minor, Justice Thomas appeared shocked that

142. *Id.* at 1003. Justice Blackmun also dissented in *Whitley* to the establishment of the malicious and sadistic standard. *Whitley*, 475 U.S. at 328.

143. *Hudson*, 112 S. Ct. at 1003.

144. *Id.* at 1003-04.

145. *Id.* Prisoners have a constitutional right to adequate, effective and meaningful access to courts to challenge violations of constitutional rights. Bounds v. Smith, 430 U.S. 817, 824, 828 (1977). *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J. dissenting):

> When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight. In reviewing a prisoner's claim of the infringement of a constitutional right, we must therefore begin from the premise that, as members of this society, prisoners retain constitutional rights that limit the exercise of official authority against them.

See also Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access to the courts for the purpose of presenting their complaints' ") (citing Johnson v. Avery, 393 U.S. 483, 485 (1969)); JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS §§ 11.5-11.6 (4th ed. 1991).

146. *Hudson*, 112 S. Ct. at 1003.

147. *Id.*

148. *Id.* at 1004. For a scathing critique of Justice Thomas's dissenting opinion see Stuart Taylor, Jr., *Justice Thomas Strikes Cruel and Unusual Pose*, N.J. L.J., March 16, 1992, at 16.

149. *Hudson*, 112 S. Ct. at 1005.

150. *Id.*

the majority would broadly assert "that *any* 'unnecessary and wanton' use of physical force against a prisoner *automatically* amounts to 'cruel and unusual' punishment."[151] In Justice Thomas's view: "a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.' "[152]

Emulating the jurisprudential style favored by Justice Scalia, Thomas began his analysis with an historical overview of the Eighth Amendment.[153] Relying heavily on *Weems v. United States*,[154] Thomas stated that the original intent of the framers was that the Eighth Amendment apply only to statutorily created punishments and criminal sentencing.[155] There is nothing in 185 years of Eighth Amendment jurisprudence—from the adoption of the Amendment in 1791 until the decision in *Estelle*—indicating that the Eighth Amendment applied to deprivations suffered in prison.[156] Thomas rationalized that:

> Surely prison was not a more congenial place in the early years of the republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment. Thus, historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.[157]

He concluded that the Eighth Amendment was originally intended to apply only to sentences given by judges, not to hardships endured by prisoners after incarceration.[158]

Thomas proceeded to discuss the standards established by the Court for medical needs claims in *Estelle* and prison deprivation claims in *Rhodes*.[159] Justice Thomas stated that *Estelle* required a prisoner to show deliberate indifference to serious medical needs and that *Rhodes* required a prisoner to show serious deprivation to be successful with the claim.[160] Justice Thomas reasoned that these two cases show that the Eighth Amendment only applies to a narrow class of conduct resulting in serious injury.[161] He said that the majority turned the Eighth Amendment inquiry into a strictly subjective test resulting in an unwarranted and unfortunate break with the Court's Eighth Amendment

151. *Id.* at 1005.
152. *Id.*
153. *Id.* For an example of Justice Scalia's historical jurisprudential approach, see Burnham v. Superior Court, 495 U.S. 604, 605 (1990).
154. 217 U.S. 349 (1910).
155. *Hudson*, 112 S. Ct. at 1005.
156. *Id.* at 1005-06.
157. *Id.* at 1005.
158. *Id.*
159. *Id.*
160. *Id. See* Estelle v. Gamble, 429 U.S. 97, 106 (1976); Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
161. *Hudson*, 112 S. Ct. at 1006.

jurisprudence.[162]

Justice Thomas also disagreed with the higher standard of malicious and sadistic established by the Court for the subjective test.[163] He noted that most excessive force cases are not situations of prisoner unrest that require a prison guard to keep order.[164] Justice Thomas stated that because so many excessive force claims are not prisoner unrest cases, the use of the force will seldom be accompanied by a malicious and sadistic mindset.[165] Before concluding, Justice Thomas addressed whether an Eighth Amendment injury always has to be a physical injury.[166] He stated that forms of punishment that inflict psychological harm, as opposed to physical harm, are also actionable under the Eighth Amendment.[167]

IV. ANALYSIS

The United States Supreme Court's decision in *Hudson*, which does not require serious injury for Eighth Amendment claims, provides prisoners with more access to the courts because any infliction of pain, above de minimis, will be the basis for an action. The respondents in *Hudson* felt that it would be detrimental to allow prisoners more access to file constitutionally-based claims because it would overburden the courts.[168] While the Court's decision may increase case-loads, the potential deterrent effect of closer scrutiny on prisons could cause less unnecessary force, and actually lead to fewer prisoner suits. Prison administrators, officials and guards will now have notice that excessive force suits are easier to file. This should provide motivation for better supervision and alternative methods of control besides beating prisoners. The Court's decision may decrease the amount of unnecessary pain inflicted on prisoners because any unnecessary pain will be actionable.

The Court's decision also recognizes that rights still exist for prisoners. The goal of incarceration in the criminal justice system should be rehabilitating prisoners and returning to society people who are productive citizens. The Court previously recognized this goal in *Rhodes v. Chapman*, stating that the function of the criminal justice system is "to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens."[169] In *Pell v. Procunier*, the Court acknowledged that incarceration

162. *Id.* at 1007.
163. *Id.* at 1008.
164. *Id.*
165. *Id.*
166. *Id.* at 1008-10.
167. *Id.* at 1009.
168. *Id.* at 1003-04.
169. 452 U.S. 337, 352 (1981). *See also* Ex Parte Lee, 171 P. 958, 959 (Cal. 1918) ("Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36-58 (1968); SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 755-64 (2d ed. 1973); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 4 (1978); Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilita-*

serves a protective function by quarantining criminal offenders for a given period of time.[170] However, *Pell* emphasized that most offenders will return to society, therefore, a paramount objective of the corrections system is the rehabilitation of prisoners.[171] While society punishes prisoners by incarcerating and stripping them of certain individual rights,[172] prison officers should not force prisoners to also endure unnecessary, dehumanizing and humiliating pain.[173] Rehabilitation will not be achieved unless prison officials respect prisoners individual rights and inherent worth as humans.

> It is obvious that, other things being equal, reformative efforts have the best chance of being successful—without too much frustration of the interests of retribution and deterrence—if the conditions of imprisonment are such that the offender not only knows that he is being "punished" (i.e., he is being deprived of his liberty and of certain creature comforts), but also knows that, because his dignity as a man is respected, efforts directed toward his reformation are genuine and sincere.[174]

The Court correctly concluded that any time prison officials inflict unnecessary harm on prisoners, society's standards of decency are violated.[175] The Court's recognition of prisoners' rights, by holding serious injury is not necessary to bring an Eighth Amendment claim, is a step in the right direction. Unfortunately, the Court's establishment of malicious and sadistic as the subjective test for all excessive force claims moves Eighth Amendment jurisprudence backwards. In *Rhodes*, the Court warned itself to proceed cautiously in making an Eighth Amendment judgment because, "unless we reverse it, '[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment,' and thus '[r]evisions cannot be made in light of further experience.' "[176] The Court should have heeded its own warning and proceeded with care and caution in establishing malicious and sadistic as the subjective standard for all excessive

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tion, Prisoners' Rights, and Violence, 7 HARV. J.L. & PUB. POL'Y 413 (1984); Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1264-69, 1318-19 (1937); Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 (1937).

170. 417 U.S. 817, 822-23 (1974).

171. *Id.*

172. *See* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 215 (8th Cir. 1974) ("[S]egregation from society and loss of one's liberty are the only punishment the law allows."); *see also* RUBIN, *supra* note 169, at 697-734; 1 TORCIA, *supra* note 169, § 21 nn.51-53.

173. *See* DeShaney v. Winnebago County Dep't. of Social Services, 489 U.S. 189, 199-200 (1989) ("when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."). For further discussion, see Project, *Prisoners' Rights*, 80 GEO. L.J. 1677 (1992); Project, *Prisoners' Rights*, 79 GEO. L.J. 1253 (1991); Project, *Prisoners' Rights*, 78 GEO. L.J. 1429 (1990).

174. 1 TORCIA, *supra* note 169, § 4. *See also* Michael & Wechsler, *Homicide II*, *supra* note 169 at 1322.

175. Hudson, 112 S. Ct. at 1000.

176. Rhodes v. Chapman, 452 U.S. 337, 351 (1981) (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976)).

force claims. Malicious and sadistic is too high of a threshold to require prisoners to prove in all excessive force claims.

The Court justifies the decision by somehow arriving at the conclusion that a prison riot does not differ much from a lesser disturbance.[177] The Court's reasoning is difficult to understand. The basis of *Whitley's* malicious and sadistic standard was the existence of a disturbance that *indisputably posed significant risks* to the safety of inmates and prison staff.[178] Unfortunately, crisis situations inherently involve quick decisions that may prove irresponsible or reckless when reviewed once the emergency has passed. When an immediate threat to the lives of prison staff and inmates presents itself officials should be able to make quick decisions without incurring liability for conduct short of malicious and sadistic. The situation in *Whitley*, where prisoners riot and take a prison guard hostage, provides an appropriate context for the malicious and sadistic standard to govern.[179] However, situations such as the one in *Hudson* do not present the same concerns. Hudson was a handcuffed prisoner who argued with a guard—he posed no significant risks.[180] There were no administrative concerns requiring quick decisions in order to protect the lives of the prison staff and inmates. Absent an emergency situation, prison officials should not be allowed latitude to administer unnecessary pain of any kind. Furthermore, the malicious and sadistic standard leaves the Eighth Amendment open to abuse by prison officials. Any testimony from a prison official, whether honest or fabricated, that a prisoner was menacing or threatening in any way provides a defense that pain was not inflicted maliciously and sadistically. The standard will be difficult for a fact finder to apply because the Court gave no solid guidelines about how to distinguish malicious and sadistic from a "good faith effort."[181] The majority should have acquiesced to the opinions of Justice Stevens and Justice Blackmun and left the standard at unnecessary and wanton.[182]

Justice Thomas' dissenting opinion leaves one to wonder exactly what position he takes on applying the Eighth Amendment to prisoner's claims after incarceration.[183] Applying a strict, historical precedent based approach, Justice Thomas initially suggests that he believes the Eighth Amendment should apply only to punishments meted out by statutes or sentencing judges.[184] Next, Justice Thomas hints of a willingness to abide by the Court's decision to apply the Eighth Amendment to prisoner's claims if the serious injury requirement is kept.[185] The reader is left to wonder which position Justice Thomas prefers. He de-

177. *Hudson*, 112 S. Ct. at 998-99.
178. *Whitley*, 475 U.S. at 320.
179. *See supra* notes 41-61 and accompanying text.
180. *Hudson*, 112 S. Ct. at 997. *See supra* notes 78-97 and accompanying text.
181. *See supra* note 112 and accompanying text.
182. *Hudson*, 112 S. Ct. at 1002-04. For further discussion of Justice Stevens's and Justice Blackmun's opinions, see *supra* notes 136-46 and accompanying text.
183. *Hudson*, 112 S. Ct. at 1005-10. *See also* Taylor, *supra* note 148 at 16.
184. *Hudson*, 112 S. Ct. at 1005-06.
185. *Id.* at 1006-10.

fends both positions by holding forth the precedents of the Court and insisting that precedent unconditionally govern,[186] however, the Constitution must be applied, not with an eye toward yesterday, but with the vision of the present.[187] Justice Thomas fails to do this by demonstrating insensitivity to a prisoner's right to be constitutionally protected from the deliberate infliction of unnecessary pain. However, his analysis of Eighth Amendment claims brought by prisoners in medical needs and prison condition contexts does support his assertion that the Court's precedents have required a serious element in those cases to meet the objective test.[188] This raises the question of whether the "serious" requirement in medical needs and prison condition cases is open for challenge.

Thomas's main disagreement with the majority hinged on the definition of "serious injury." In Thomas's view, by *definition* any punishment that is "diabolic and inhuman" inflicts serious injury.[189] He concluded that the majority opinion requires injuries be physical to be considered injuries at all, and that there are many types of injury that leave no physical manifestations.[190] However, this line of analysis seems to contradict Thomas's critique of the majority for allegedly abandoning the "objective standard." Thomas insists that some objective form of injury is required, but then insists that psychological forms of injury—which are by definition subjective—need also be included in the category of Eighth Amendment violative injuries. It becomes quite unclear exactly what standard he advocates.

Thomas appears to lose focus of the basic facts of this case: three prison guards, acting in concert, inflicted a humiliating beating on a shackled prisoner. This beating was the result of a minor altercation between prisoner and guard. Although Thomas champions the significance of non-physical, psychological injuries as a potential source of Eighth Amendment transgressions, he failed to consider the potential psychological impact of the punishment meted out to Hudson. While the majority may have reached its decision through a rather circuitous

186. *Id.* at 1005-11.

187. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934):

> It is no answer . . . to insist that what the provision of the Constitution meant to the vision of [the framers'] day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

188. *Hudson*, 112 S. Ct. at 1006 (citing *Estelle*, 429 U.S. at 106 ("acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs")) (citing *Wilson*, 111 S. Ct. at 2324) ("was the deprivation sufficiently serious?")).

189. *Id.* at 1009.

190. *Id.* at 1009. "Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999'—may cause agony as they occur yet leave no inflicting injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks" *Id.* (citing Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988)).

and unsatisfying path, clearly its result is preferable to the harsh result which Thomas's opinion would dictate.

The Court's refusal to address whether an isolated incident of violence against a prisoner is punishment under the Eighth Amendment leaves doubt as to whether this decision will stand or be extremely narrowed in the future. The Court should have addressed the issue and left no doubt.[191] If, at a later date, the Court determines that isolated beatings are not within the Eighth Amendment's definition of punishment, prisoners will be in a worse position then they were before *Hudson*. At that point, their access to the courts will be extremely narrow and the subjective threshold they will have to prove to be successful in their claims will likely remain at malicious and sadistic.

V. CONCLUSION

The Eighth Amendment analysis after *Hudson* still includes both an objective and a subjective test. *Hudson* makes it easier for prisoners to meet the objective test, thus making it easier for them to file suits. Yet *Hudson* also makes it harder for prisoners to meet the subjective test, meaning fewer prisoner's claims will be successful. If the threat of lawsuits has a deterrent effect on prison officials, the decision will provide a positive change in the criminal justice system. However, the higher subjective threshold of malicious and sadistic will cause fewer claims to be successful, which means changing the conditions of the current prison system will be a slow process. The next major issue in Eighth Amendment claims brought by prisoners after incarceration is determining whether isolated beatings are "punishment" under the Amendment. Prisoners have had a difficult enough time of proving that prison officials inflicted unnecessary and wanton pain. Proving the infliction of malicious and sadistic pain may prove nearly impossible. Eighth Amendment jurisprudence may have taken one step forward and two steps back.

Dale E. Butler

191. The Court granted certiorari specifically on the objective issue of whether the Eighth Amendment is violated by anything less than serious injury. *Hudson*, 112 S. Ct. at 1004 (Thomas, J., dissenting). Since the Court decided to go beyond this issue and establish a new subjective standard, it should have further clarified whether "isolated beatings" constituted Eighth Amendment violations.